

**Adjudication Application No. : SOP/AA10 of 2006**

Between

**COMPANY AU**

... Claimant

And

**COMPANY AV**

... Respondent

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**(AMENDED)  
ADJUDICATOR'S DETERMINATION**

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**Mr Philip Jeyaretnam, S.C.  
Adjudicator**  
Singapore Mediation Centre  
1 Supreme Court Lane, Level 4  
Singapore 178879

**Solicitors for the Claimant**

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**Solicitors for the Respondent**

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Ref: XXX

Dated this 11th day of September 2006

Re-Dated this 28<sup>th</sup> day of September 2006

## Background

1. By an agreement dated 20 April 2006 (the Contract) the Claimant was engaged by the respondent as Architects to provide architectural and civil & structural engineering services in relation to a Refuse Incineration Plant on Lot XXX at YYY Avenue, Singapore. The fee was a lumpsum of \$1,136,000, but broken down by percentage for different stages of work.
2. The Contract was terminated on 6 July 2006.
3. On 26 July 2006 the Claimant served on the Respondent its Payment Claim in the sum of \$366,786 inclusive of GST. The Respondent issued its Payment Response on 2 August 2006, agreeing to \$80,514. While there is no provision for it under the Building and Construction Industry Security of Payment Act (Cap 30B) the Claimant issued a Reply on 14 August 2006, which was subsequently incorporated into the Claimant's Adjudication Application dated 14 August 2006. By the Claimant's Adjudication Application the claimed amount was \$286,272 (\$366,786 less \$80,514).
4. I was appointed as adjudicator on 18 August 2006. A preliminary meeting was held on 23 August 2006, at which a hearing date was fixed for 1 September 2006. The Adjudication Response was filed on 24 August 2006.
5. The hearing on 1 September 2006 was attended by:
  - a. For Claimant – *Mr L* and *Mr M* from M/s Rajah & Tann, and *Mr N*, *Mr O* and *Mr P* from the Claimant

- b. For Respondent – *Mr Q* and *Ms R* from M/s Wong Partnership, and *Mr S* and *Mr T* from the Respondent.

## **Issues**

6. The issues that fell to be determined were as follows:
  - a. Whether I had jurisdiction to adjudicate on the Payment Claim as it referred to and relied on four tax invoices, three of which had been included in an earlier Adjudication Application where the adjudicator was Mr Giam Chin Toon, SC ('the Giam Adjudication').
  - b. Whether I had jurisdiction to adjudicate on the Adjudication Application, as the Contract had been terminated on 6 July 2006.
  - c. If I had jurisdiction, then what amount was payable for the work done.
7. The Claimant objected to the Respondent's two jurisdictional objections, as they were not mentioned in the payment response, and so could not be included in the adjudication response by virtue of Section 15(3) of the Act.
8. At the end of the hearing, parties agreed to extend time for the issue of this award to 11 September 2006.

## **Determination**

9. I first considered whether I should exclude the Respondent's jurisdictional objections, on the basis that they had not been mentioned in the payment response. I am of the view that I should not. They are legal in nature, and concern the jurisdiction of the

adjudicator rather than being 'any reason for withholding any amount'. A jurisdictional objection to the adjudicator is not itself a reason for withholding payment under a contract. Whether payment is due (or subject to set-off and so forth) depends on the contract, not on the adjudication process. Even if I have no jurisdiction, that would not be a reason for withholding payment if it is due, and a subsequent arbitration award or court judgment would (all things being equal) order payment and include interest from the due date.

10. I therefore went on to consider the two jurisdictional objections.
  
11. The first depends on the proper reading of section 10(1) of the Act which permits a claimant to serve 'one payment claim in respect of a progress payment'. Indeed, of the three invoices that were included in the Giam Adjudication one (XXX) was adjudicated upon and so the amount claimed by it, even though repeated in the later payment claim, plainly falls out of this Adjudication, as was accepted by the Claimant. The other two were not adjudicated upon, on the ground that the notice of intention and the adjudication application were made out of time.
  
12. Consequently, those earlier two invoices (XXX and XXX) remain simply unadjudicated payment claims. Section 10(4) of the Act permits a claimant from including in a later payment claim an amount that was the subject of a previous payment claim, so long as that amount has not yet been paid. In the case of the first invoice, however, I do not have to make any adjudication because it has been accepted in full by the Respondent.
  
13. The second objection is to this adjudication proceeding after termination of the Contract. The Respondent relied on various references within the Act and in the

parliamentary reports that suggest the Act applies only during the subsistence of a contract. I also noted to both counsel in the course of the hearing that while the New South Wales Act expressly included within the definition of 'progress payment' 'the final payment for construction work carried out', our Act did not. Nonetheless, I am of the view that the Act does apply even after a contract is terminated. First, the intention to protect cash flow would not be achieved if the interpretation put forward by the Respondent is adopted. If cash flow is blocked on one project, that will affect a contractor or service provider's financial resources for other projects. Secondly, although one always speaks of termination of a contract when it is really the right and obligation to do work and be paid for it which is terminated for the future, the contract continues to govern the relationship between the parties in relation to the work already done.

14. Accordingly, I proceeded to consider the merits of the adjudication claim. The claim broke down into eight components:

	<b>Claim Description</b>	<b>Contractual %</b>	<b>Claimed %</b>	<b>Response %</b>
1	Clause 2.1(1)(b) Upon completion of the schematic design and submitted to client for approval	10%	10%	0%
2	On obtaining provisional planning approval	2.5%	2.5%	0%
3	Clause 2.1(e), (f) and (g) On obtaining written permission	2.5%	0.5%	0%
4	Clause 2.1(2)(a) and (b) Upon completion of application documents and drawings sufficient for submission to the relevant technical depts for DC and or BP clearance	10%	2%	0%
5.	Clause 2.1(2)(d), (e) and (f) On obtaining BP approval	5%	1%	0%
6.	Clause 3.1(3)(a) Upon finalising the design development drawings to be issued to principal consultants for their detailed designs	7.5%	1.5%	0.5%
7	Clause 2.1(3)(a) and (b) Preparing and finalising detailed tender drawings, specifications and other documents for calling of tender for main contract	10%	2.5%	0%
8.	Clause 2.1(3)(d) and (e) evaluation of tenders and making recommendations to client for award of contract	2.5%	0.75%	0.25%

15. Counsel for the Claimant referred me to a number of clauses in the Contract, including:

- a. 1.3(2) – entitlement to fees for the schematic design and design development stages irrespective of approval from the competent authority.
- b. 1.4(5) – entitlement on termination to a proportionate amount of the remuneration accrued and due based on the percentage of work completed at the date of termination.

16. Counsel for the Claimant also took me through the documents included in the Payment Claim and in the Reply to demonstrate the work done.

17. Counsel for the Respondent stressed that the contract had been terminated at an early stage – after 2 months out of a total of 36 months. The claim for 30.75% of fees, even with some element of front-loading, was wholly disproportionate. He also noted the absence of calculations to show the amount of work done as against the work required to achieve each contractual stage. He also took me through the documents arguing that these showed only very preliminary work being done by the Claimant. Counsel for the Claimant's response was that calculations would assist in determining quantities of work done by a contractor but would not really assist for an architect's design, where the work done was qualitative as much as quantitative.

18. After careful review of the documents submitted by the Claimant and hearing the arguments of both Counsel, I am not satisfied that any fees are due except for the schematic design stage under Clause 2.1(1)(b). Even for this stage, I am not satisfied that it had been fully completed at the time of termination. It appears to me to be about 80% completed.

19. I therefore reject the Adjudication Application except for the sum of \$90,880 plus GST of \$4,544.

20. As I have noted, the Respondent had agreed to certain amounts in its Payment Response, and so those amounts were not included in the Adjudication Application.

21. I hereby determine that:

- a. The sum of \$95,424 is to be paid by the Respondent to the Claimant;
- b. The date on which the adjudicated amount is payable is ~~30 June 2006~~ 15 July 2006;
- c. The Respondent pays the Claimant simple interest on the sum of \$95,424 at the rate of ~~4%~~ 6% per annum from ~~30 June 2006~~ 15 July 2006 to the date of payment; and
- d. Costs of the adjudication to be paid half by the Claimant and half by the Respondent.

Determination dated 11 September 2006

Determination re-dated 28 September 2006

Philip Jeyaretnam S.C.

Adjudicator